FILE COPY

Office - Supreme Court, U. S.
NOV 11 1944
CHARLES ELMORE CROPLEY
CLERK

No. 45.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

BESTER WILLIAM STEELE, - - - - - Petitioner,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMAN AND ENGINEMEN, ET AL., - - - - Respondents.

On Certiorari to the Supreme Court of Alabama.

BRIEF FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

CHAS. H. EYSTER,
WHITE E. GIBSON,
Attorneys for Louisville & Nashville Railroad Company.

November, 1944.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX OF ARGUMENT.

	PAGE
Statement of Case	1
(a) Original Complaint and Demurrer thereto by Railroad	2
(b) Substituted Amended Complaint	3
(c) Demurrer of Railroad	11
Fifth Amendment to Constitution of United States	15
Accepted Practice and Universal Customs Are Written Into Contract	18
Petitioner, Whether Member of Brotherhood or Not, was Subject to the Agreement and Its Provisions as Made and Changed by the Parties Thereto	21
One Not a Member of Union Being a Third Party is Under the Agreement	23
Brotherhood is a Principal to Agreement	25
Mandatory for Railroad to Negotiate and if Practicable Agree with Brotherhood for all of a Class	26
A Contract Must Be Accepted or Rejected as a Whole	34
Neither Fraud Nor Conspiracy Charged Against Railroad Sustained by Averments in Bill	34
No Fraud or Conspiracy by Railroad in Change of Agreement	37

CASES CITED.

	PAGE
Article 32 (a), Agreement of March 1, 1929	25
Atlantic Coast Line v. Pope, 119 F. 2d 43	28
12 Am. Jur., Sec. 289, p. 842	24
Birmingham Water Works Co. v. Hernandez, 196 Ala. 438	20
Bixby-Theisen Company v. Evans, 174 Ala. 571	20
Blackmon v. Quennell, 189 Ala. 633	34
Board of Rev. of Covington Co. v. Merrill, 193 Ala. 547	35
Brotherhood of R. R. Trainmen v. Toledo, Peoria & W. R., 88 L. Ed. 331, Ad. Op.	25, 28, 29
Brotherhood of Ry. & SS. Clerks v. United Transport Service Employees of America, 88 L. Ed. 153, 88 L. Ed. 375	26, 29
Burton v. Ore. Wash. R. & Nav. Co., 38 Pac. 2d 73	30, 31
City of Greenville v. Greenville Water Works, 125 Ala. 625	20
Corrigan v. Buckley, 70 L. Ed. 972, 271 U. S. 322	17
Donovan v. Travers, 285 Mass. 167, 188 N. E. 705	25, 29
Division 525, Order of Ry. Conductors of America v. Gorman, 133 Fed. 2d 278	41
Franklin Fire Ins. Co. v. Howard, 230 Ala. 668	24
Hartley v. Brotherhood of Ry. & SS. Clerks, 277 N. W. 887	23, 30
J. I. Case Co. v. National Labor Relations Board, 88 L. Ed. 489, Ad. Op.	25, 29
McCluskey v. Steele, 18 Ala. App. 33	43
Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145	20
Moore v. Ill. Cent. R. R. Co., 176 So. 569, 85 L. Ed. 1089, 312 U. S. 630	23

PAGE

National Park Bank v. L. & N. R. R. Co., 199 Ala. 198. 42

Order of Railroad Telegraphers v. Ry. Ex. Agency, 88 L. Ed. 495, Ad. Op. 26, 36

Peacock v. Va. Carolina Chem. Co., 221 Ala. 682 23

Steele v. L. & N. R. R. Co., 245 Ala. 113, 16 So. 2d 416. 17, 25, 29, 36

Teague v. Brotherhood of Locomotive Firemen, etc., 127 F. 2d 56 ..... 16, 30

Virginian Railway Co. v. System Federation No. 40, 81 L. Ed. 800 29

Williams v. Williams, 238 Ala. 639 35

Y. & M. V. R. Co. v. Sideboard, 133 So. 627 25

Y. & M. V. R. Co. v. Webb, 64 Fed. 2d 903 25

STATUTES CITED.

Railway Labor Act (Act May, 1920, 1926, as amended by Act of June 20, 1934) 45 U. S. C. A. Sections 151-164 26

Fifth Amendment Constitution of the United States. 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 45.

BESTER WILLIAM STEELE, - - - *Petitioner,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL., - - - *Respondents.*

On Certiorari to the Supreme Court of Alabama.

BRIEF FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

STATEMENT OF CASE.

At the time of the preparation of this brief, the Respondent, Louisville & Nashville Railroad Company, has not been served, and is without brief of petitioner on merits; wherefore it is necessary to make a statement of the case.

ORIGINAL COMPLAINT AND DEMURRER THERETO BY RAILROAD.

The original Bill in this cause was filed in the Circuit Court of Jefferson County, Alabama, in Equity by Bester William Steele, as complainant v. Louisville & Nashville Railroad Company, a corporation, and Brotherhood of Locomotive Firemen and Enginemen, an unincorporated Association, Respondents, on August 30, 1941 (R., p. 3).

To this complaint the Louisville & Nashville Railroad Company filed demurrer (R., pp. 21 and 30), and on January 21, 1942, demurrer was sustained by decree of the Circuit Court, and complainant allowed 30 days within which to amend. The bill was twice amended (R., pp. 49 and 77) and dismissed upon complainant being authorized to file a Substituted Bill in said cause (R., p. 82), which was filed August 14, 1942 (R., p. 83).

On April 27, 1943, demurrer of the Respondents was sustained to Substituted Bill, and Bill dismissed (R., pp. 124, 126), from which ruling complainant took an appeal to the Supreme Court of Alabama, where decree was rendered January 13, 1944, affirming the decree of the Circuit Court, and opinion rendered (R., p. 131). 245 Ala. 113, 16 So. (2) 416. Petition for writ of Certiorari to the Supreme Court of Alabama filed in this Court on March 29, 1944, granted May 29, 1944.

SUBSTITUTED AMENDED COMPLAINT.

Substituted Amended Complaint (R., p. 83) filed by Bester William Steele, a negro fireman on the S. & N. A. Division of the L. & N. R. R. Co. (hereinafter designated Petitioner) on behalf of himself and other negro firemen of the same craft or class against the L. & N. R. R. Co., an interstate carrier (hereinafter designated as Railroad); the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated international union, whose membership is principally derived from white men, and which restricts its membership to white men, and excludes negro firemen because of race (hereinafter designated as Defendant Brotherhood); and three Chairmen of local lodges of the Defendant Brotherhood, involves as it relates to the Railroad, Respondent, primarily the questions of alleged seniority rights and job assignments of the Petitioners, under an agreement of March 1, 1929, and as amended February 22, 1941, and modified between the Railroad, Respondent, and the Brotherhood as collective bargaining agency and representative of the firemen under the Railway Labor Act hereinafter designated as Brotherhood, and in the negotiations and execution of such amended contract of February, 1941, and modification thereof in May, 1941, and seeks (1) to enjoin the enforcement and recognition of said agreement; (2) Discovery; (3) Declaratory Judgment.

Petitioner claims seniority rights dating from the time he was employed and has worked as a locomotive

firefnan, in March, 1910, averring that from December 28, 1921, to April 8, 1941, he worked as a fireman in the road passenger service on the South & North Alabama Division, when he was displaced by alleged wrongs of the Railroad and the Brotherhood (R., p. 85).

Petitioner claims to be in perfect health; to at all times have performed his duties as locomotive fireman, loyally and efficiently to the best interest of the Railroad; and avers his original employment with the Railroad was under an individual contract of hiring between himself and the Railroad, which contract, however, has been modified from time to time by mutual agreement between the Petitioner and the Railroad; and Petitioner avers his contract embodies the terms of collective bargaining "Agreement between the L. & N. R. R. Co. and Its Locomotive Firemen and Hostlers," issued March 1, 1929 (R., p. 86).

Reference to this Agreement of March 1, 1929, shows that it contains provisions as follows:

> "Article 34—Duration of Agreement.
>
> "The rates, rules and working conditions as provided herein shall be continued in effect, subject to thirty days' written notice by either party,"

That the negro firemen constitute a majority of firemen employed on the South and North Alabama Division, while the Brotherhood Member Firemen constitute a majority of the total number of firemen employed on the entire System of the Railroad; that the negro firemen and the Brotherhood member firemen together

constitute the entire Craft or Class of firemen employed by the Respondent Railroad (R., p. 86).

That the Brotherhood has a majority of firemen on the System, and its membership, since the passage of the Railway Labor Act, has chosen the Brotherhood as the Representative of the entire Craft or Class of firemen employed by the Railroad; that the Brotherhood has claimed the exclusive right to act, and has acted as the "Exclusive Bargaining Agent and Grievance Representative of the entire Craft or Class" (R., p. 86), and its members have individually and collectively claimed the benefits of its actions as such. That the negro firemen have never been given an opportunity to nominate or participate in the choosing of a representative under the Railway Labor Act, but by virtue of their *minority position* they have been compelled to accept the Brotherhood as a choice of the majority for their Statutory Representative under the Railway Labor Act for the purposes of the Act (R., p. 87). That the negro firemen did so accept the Brotherhood as their Representative under the Act for the entire Craft; and assuming that the Brotherhood would exercise its powers under the Railway Labor Act without fraud or discrimination against them, they relied on their Representative for protection of their rights in collective bargaining and handling of grievances with the Respondent, Railroad.

Negroes are only employed as firemen by railroads in the South, and constitute the minority of the entire Craft or Class of the Southern Systems. On most of the Railroads of the Southern Systems, the Firemen,

ever since the passage of the Railway Labor Act, have chosen the Brotherhood as the Representative under the Act for all firemen.

Plaintiff alleges that the Brotherhood, by accepting the designation of the "Bargaining Agent of the Firemen under the Act," and by asserting the exclusive right to represent the negroes in Collective Bargaining, and handling of grievances, has placed itself in a confidential relation with each fireman and undertaken a fiduciary duty to represent him impartially and in good faith; to give him reasonable notice and opportunity to be heard and chance to vote on any action proposed by it, adverse to his interest; and to make prompt and full disclosure of all actions taken by the Brotherhood affecting his interest, and not to discriminate against negro firemen in its, or its members' favor, because not members of the Brotherhood; and generally to properly discharge its duties as the Statutory Representative of the entire Craft, but that the Brotherhood has violated its duty by persistently being hostile and disloyal to the Petitioner, and has sought to destroy his alleged vested seniority rights, and to drive him and other negroes out of employment in order to create a monopoly employment for themselves, or to obtain for themselves favored conditions, and has refused to advise the Petitioner of matters adversely affecting his interest, and to give him a chance to be heard or vote on same; and refused to report to Petitioner its actions or to give him and other negro firemen, a fair, honest and faithful representation under the Railway Labor Act.

Petitioner avers that on to-wit: March 28, 1940, the Brotherhood, without notice to appellant and other negroes, acting through its General Chairman, and purporting to act under the Railway Labor Act on behalf of all firemen, served a notice on the Railroads to amend existing Collective Bargaining Agreements, covering the standard provisions in the *individual hiring contracts* of the individual fireman on each Railroad, aimed at driving the negro firemen completely out of the service. This notice is made Exhibit "A" to the Bill (R., pp. 59, 60).

That according to existing Railroad practice prevailing in the United States, locomotive engineers are obtained by promotion of selected white locomotive firemen, and that by tradition and universal practice negro firemen arbitrarily are never promoted to engineers; that white firemen are known under standard Railroad practice as "promotable men," and negro firemen as "non promotable."

That the Director of Personnel of the Railroad knew that the Defendant Brotherhood has always been hostile to negro firemen, and has persistently sought to destroy negro firemen's claimed seniority rights, and has attempted to drive them out of the service, to the monopolistic benefit of white firemen, the Bill averring that the aforesaid notice from the Brotherhood to the Railroad was in execution of a fraudulent, disloyal purpose of the Brotherhood.

That by virtue of the contracts entered into between the Railroad and the negro firemen, the Railroad was under duty to give preference of runs to the

oldest firemen in road service, when competent, and that the known purpose of the aforesaid Notice from the Brotherhood to the Railroad was to cause the Railroad to curtail Petitioner's seniority rights, and to breach its contract with the negro firemen to the advantage of the Brotherhood Members, and that the Railroad did violate its duty to plaintiff by entering into the agreement with the Brotherhood, effective February 22, 1941.

That in May, 1941, the Railroad and Brotherhood each acting through authorized Agents, made a modification of the February Agreement, further curtailing complainant in his seniority rights, and that in negotiating and executing said Modification, the Brotherhood purported to act as a Representative under the Railway Labor Act of the entire Craft or Class of firemen, without notice to the firemen or opportunity to them to be heard, and that the Brotherhood never reported to the negro firemen its negotiations and execution of the contract or its modifications, but the negroes learned of it from other sources.

Petitioner avers, in Paragraph 18 (R., p. 90), that in negotiating and executing the Agreement and Modification, the Railroad did conspire and confederate with the Brotherhood to curtail the seniority rights and job assignments of negro firemen in breach of existing contracts with the negro firemen to the fraudulent advantage of the Defendant Brotherhood member firemen (R., p. 91); that under the operating policy of the Railroad, practically every time a vacancy occurred on the South and North Seniority Division, or a new

run or job was created, the Brotherhood and the Railroad, in further execution of said conspiracy, arbitrarily disqualified negro firemen regardless of seniority, competency, etc., under "Color of said Agreement and Modification" (R., p. 91); and as a result the employment of negro firemen was severely curtailed and employment of Defendant Brotherhood member firemen increased, thereby unjustly enriching the Defendant Brotherhood through more dues.

Prior to the passage of the Railway Labor Act, and down to April 8, 1941, Petitioner, by virtue of his seniority, was a fireman in Road Passenger Service, assigned to the most favored South End Passenger Pool, rotating first in first out, for which he received a certain rate of pay and worked certain hours, and that on April 1, 1941, the jobs on the South End Passenger Pool were bulletined for bidding in because the number of firemen in the Pool had to be reduced after April 7, 1941, due to reduction in mileage, and then sets out a seniority list, in which the plaintiff's seniority is the oldest. That the Railroad and the Brotherhood, in further execution of said alleged conspiracy did arbitrarily disqualify the negro firemen from bidding in any Pool Job "Under Color of said Agreement and Modification," assigning the jobs to Brotherhood member firemen, solely by force of said Agreement and Modification.

That as a result of being allegedly, illegally and fraudulently barred from bidding in a Pool Job, Petitioner was completely thrown out of work for a period of about sixteen days, and thereafter had a harder and

less remunerative job, until January 3, 1942, when he was reassigned to the South End Passenger Pool, this being the job Petitioner originally had, and from which he claims he should never have been removed.

That he has exhausted his remedies through the structure of the Railroad and Brotherhood without avail, all the officers of the Railroad and Brotherhood reaffirming both the Agreement and Modification, and expressing their intention of enforcing the same.

That unless restrained by the Court, his seniority rights and job assignment will be continuously threatened, and curtailed by the Railroad and Brotherhood, acting in conspiracy under color of said Agreement and Modification, and he will be deprived of fair, honest and impartial representation by the Brotherhood.

Petitioner then asks for a discovery of certain matters which he alleges to be within the peculiar knowledge of the Railroad and Defendant Brotherhood (R., p. 94).

In Paragraph 26 (R., p. 95), Petitioner alleges an actual claim or controversy exists between Petitioner, on the one side, and the Railroad, Brotherhood, and Defendant Brotherhood member firemen on the other, as to the duties of the Brotherhood toward the negro firemen, as Representatives of the entire Craft under the Railway Labor Act; and as to the lawful force and effect, if any, of the Agreement and Modification.

That Section 2 Fourth (U. S. C. A., Section 152 Fourth of the Railway Labor Act) so far as it attempts to confer authority on the majority of a Craft or Class the power to choose Representatives for the entire

Craft or Class, and confer and bestow upon said Representatives unbridled and absolute power to destroy minority property rights in favor of the majority, violates the due process clause of the Fifth Amendment to the Constitution of the United States, and is void.

Then follows the Prayer of the Bill.

DEMURRER OF RAILROAD.

The equity and sufficiency of the substituted Bill and its various phases was demurred to by the Railroad.

Demurrer of the L. & N. R. R. Co. to the Substituted Bill, as a whole, will be found at pages 21 to 27, inclusive, and to certain aspects thereof, pages 30 to 34, inclusive, and page 98.

Many grounds of demurrer, aside from the general demurrer to the equity of the Bill, were filed. We call particular attention to certain grounds of demurrer, *i. e.:*

(1) Petitioner fails to allege the terms of any individual contract between Petitioner and Railroad entitling Petitioner to seniority rights; (2) to the point that the Petitioner seeks the benefits of the provisions of an agreement between the Railroad and the Brotherhood of March 1, 1929, yet is unwilling to abide by its terms, provisions and conditions; (3) those grounds of demurrer taking the point that Petitioner fails to allege what the alleged conspiracy was between the Railroad and the Brotherhood, and is insufficient in

its averment of facts to sustain a charge of conspiracy but alleges conspiracy as a conclusion; (4) grounds of demurrer to the point that the action taken by the Railroad was under and by virtue of the provisions of law, namely, Railway Labor Act of June 21, 1934, wherein the L. & N. R. R. Co. had no alternative but to treat and act with the legally established Bargaining Agency of the Brotherhood under the provisions of the Railway Labor Act (R., pp. 20, 21); (5) grounds of demurrer taking the point that the Railroad acting under and in compliance with the law, could not be held as working a wrong or injury; (6) grounds of demurrer taking the point that the Railroad could not in anywise be held responsible for the creation or selection of the Bargaining Agency by employees of Defendant Brotherhood; (7) to the point that the allegations of facts in the Bill are contradictory of and repudiate the conclusions averred. (8) Also those grounds of demurrer taking the point that the agreement entered into between the Railroad and the Bargaining Agency are binding on the complainant and other individuals, and that Petitioner is not entitled to accept and receive the benefits of the Acts and Agreements of the contracting parties, and revoke and repudiate provisions and conditions of the agreement which he deems unfavorable to him. (9) Grounds of demurrer to the proposition that the Railroad did not willingly enter into any contract or agreement, prejudicial or injurious to the complainant. (10) Grounds of demurrer taking the point that the Railroad could not be considered in anywise responsible for any act of alleged

infidelity on the part of the Brotherhood to the plaintiff, and to the effect that the Bill does not allege any lack of authority upon the part of the Brotherhood to make an agreement with the Railroad. (11) To the effect that the relief sought by the plaintiff in this case would be to force the Defendant, Railroad Company to violate the law as enacted by the Congress of the United States.

Demurrer to certain aspects of the Bill shown commencing at R., p. 30.

A. To that aspect of the Bill of complaint by which the Petitioner seeks as an individual, the benefits of the alleged agreement between the Railroad and Brotherhood of March 1, 1929, on the grounds principally that plaintiff seeks the benefits of said agreement, but is unwilling to accept the provisions which he deems to be unfavorable to him (R., p. 30).

B. To that aspect of the Bill by which plaintiff admits the legality of the creation and existence of the Brotherhood as the Collective Bargaining Agency for the firemen and is unwilling to abide by its action (R., p. 31).

C. To that aspect of the Bill charging the Railroad with acting pursuant to a conspiracy between the Railroad and the Brotherhood because the Railroad only negotiated and consummated an agreement with the official Representative of the firemen under the Railway Labor Act, as required by law, and for the official acts of the Brotherhood, the Railroad is in no wise responsible (R., p. 32).

D. To that aspect of the Bill alleging restriction in membership of the Brotherhood; the Railroad being prohibited by penal statute from participating in the policies and organization of the Brotherhood, and in designating and determining its membership (R., p. 32).

E. To that aspect of the Bill charging disloyalty or breach of pledged fiduciary duty to the complainant, the Railroad owing no statutory duty to the individual Petitioner, except to treat with the Brotherhood, the Collective or Bargaining Agency of Petitioner and the firemen as a Craft or Class (R., p. 32).

F. To that aspect of the Bill alleging the making of a secret contract or agreement of February 18, 1941, there being no duty chargeable to the Railroad Company to make known to the plaintiff or any other individual fireman the making of a contract with the official Bargaining Agency, nor any duty on the Railroad to inform every fireman in its employment of the matters the two principals were negotiating.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The strained and untenable theory of Petitioner that he has averred a case entitling him to protection under, and the right to invoke the Fifth Amendment to the Constitution of the United States, and therefore asserting that the Supreme Court of Alabama erred in its holding that the grant of power by Congress under the Railway Labor Act to the Bargaining Representative duly elected by the majority of the Craft was not subject to the restraints of the Fifth Amendment to the Constitution of the United States, is clearly a misconception and erroneous interpretation of the Amendment, and finds no support whatever in the Fifth Amendment, nor in state or federal cases construing the same. To the contrary, this same Craft or Class of Firemen of which Petitioner is a member, has previously urged and had denied the same contention it now makes.

> "The single question presented for adjudication is whether the complaint states a cause of action that arises under the Constitution or laws of the United States. The Constitutional provision relied upon is the Fifth Amendment, and the law is the Railway Labor Act. Accepting, as we must, the allegations of the complaint, and so assuming that the defendants entered into a secret agreement, the effect of which was to impair the seniority rights of the plaintiff and members of his class, and that the complaint states a justiciable controversy, our inquiry must be directed to whether

it is cognizable in a Federal Court. It has long been settled that a suit arises under the Constitution and laws of the United States only when the plaintiff's own statement of his cause of action shows that it is based upon a Federal law, or upon the Constitution. Louisville & Nashville R. R. v. Mottley, 211 U. S. 149, 29 S. Ct. 42, 43, 53 L. ed. 126. * * * "* * * The provisions of Sec. 2, subd. eighth make the terms of the collective bargaining agreement a part of the contract of employment between the carrier and each employee—the case, nevertheless, remains one based upon a contract between private parties cognizable, if at all, under state law."

Teague v. *Brotherhood of Loc. Firemen, etc.*, 127 F. 2d 55.

"Nor does the plaintiff establish a basis for Federal jurisdiction by assertion of right under the Fifth Amendment. The Fifth Amendment relates but to governmental action, federal in character, not to action by private persons. Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969; National Federation of Ry. Workers v. National Mediation Board, 71 App. D. C. 266; 110 F. 2d 529, 537. Private parties acting upon their own initiative and expressing their own will, however else they may offend and their acts give rise to justiciable controversies, do not thereby offend the guarantees of the Constitution. Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 78 L. ed. 1292, 97 A. L. R. 680."

Teague v. *Brotherhood, etc., supra*, 56.

And by this Court in the case of *Corrigan* v. *Buckley*, it is held:

> "The 5th Amendment 'is a limitation only upon the powers of the general government,' Talton v. Mayes, 163 U. S. 376, 382, 41 L. ed. 196, 198, 16 Sup. Ct. Rep. 986, and is not directed against the action of individuals."
>
> *Corrigan* v. *Buckley*, 70 L. ed. 972, 271 U. S. 322.
> *Steele* v. *L. & N. R. R. Co.*, 245 Ala. 113.

If there should be removed from this case the Collective Bargaining Agreement of March 1929, Petitioner would have no semblance of standing in either a State or Federal Court. His entire case is founded on the Collective Agreement and modifications, and not on any unconstitutional Act of Congress exceeding its powers.

In its final analysis, Petitioner's claim is based solely on the provisions of an agreement made by and between duly authorized principals for him, and by which he has employment with the Railroad today. The Railway Labor Act makes no provision for dictating the terms of any agreement between the parties. The March 1929 Agreement made due and ample provision for a change and modification of its provisions, and confessedly this has been done on many occasions prior to the February change, solely under the provisions of the agreement, and this last change was no different in its manner of consummation than when previous changes had been effected. The Federal Statute did

not make the change compulsory on the parties, nor did it in anywise influence the provisions of the changes. Such changes as were made resulted from negotiations of the principals.

ACCEPTED PRACTICES AND UNIVERSAL CUSTOMS ARE WRITTEN INTO CONTRACT.

If, as alleged in the Bill according to existing practice in the United States (R., p. 81), engineers are made by promoting selected white firemen, and if negro firemen accept employment as such with the Railroad under a contract of hiring which, by tradition and universal and accepted custom and practice, never permits them to be promoted to the position of engineer, then when the Railroad makes a Collective Agreement with its Employees through a legally constituted Bargaining Representative of all firemen, both white and negro, whereby there is made provision for employment, proper training and promotion of men eligible for promotion to engineers when, without such reserves, the Railroad could not operate and would not be in a position, because of lack of engineers to meet the requirements of the public, can it be truly said that the making of a contract for such contingency is improper?

It is clear from the positive averments of the Bill that at the time of the contract of hiring of plaintiff and before and since, it was traditional and the universal practice and custom of all Railroads not to use negroes as engineers (negroes are not employed on Railroads as locomotive firemen, except in the South

(R., p. 87)), therefore, there was written into the contract of hiring of Petitioner and his continuance in the service, regardless of the time in the service, an agreement that he would not be promoted to the position of engineer. So the Agreement of February 1941, and its Modification in this phase, did not deny or deprive Petitioner of a right to be promoted to an engineer, *Petitioner agreed to this at the time of his hiring* in March, 1910, and "complainant, employed by the Railroad, is still working for it under an individual contract of hiring between himself and the Railroad" (R., p. 86), but his contract, working rights, etc. are as made for him by the Collective Agreement.

What changes and modifications in the Trade Agreement prior to February 1941, made by Representatives under the Railway Labor Act affecting Petitioner's rate of pay, hours, working conditions, etc., and to all of which he was no doubt agreeable, have not been averred, and as there are no complaints to such previous modifications, it must be assumed they were satisfactory and advantageous to Petitioner.

In view of the world affairs since February 1941, and the unparalleled burdens placed on the railroads of this country since December 1941; Judge Creel very wisely foresaw, in the terms of the 1941 agreement, the probable and likely need for more engineers, and the necessary training to qualify men for such a responsible position, and the provision for supplying that need, and the necessity of qualifying firemen for promotions to meet the urgent demand which has been made upon the railroads of the South; and thus con-

strued in the light of subsequent happenings, this agreement has done its part in enabling the Railroads to make their greatest record of mileage, persons and property transported, and public service.

The universal and accepted custom and practice to not promote negro firemen to engineers being traditional and invariably practiced, was part of the contract of hiring, voluntarily made and entered into by Petitioner, and he is not now complaining that the February agreement denies him promotion to the position of engineer. Engineers are essential, and without them there can be no firemen, and in order for one to become an engineer, he must first be a fireman. It was a practical measure to provide a reasonable reserve of promotable firemen.

> "The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty."

Mitau v. *Roddan*, 149 Cal. 1, 84 Pac. 145, 150;
City of Greenville v. *Greenville Water Works*, 125 Ala. 625;
Bixby-Theisen Company v. *Evans*, 174 Ala. 571;
Birmingham Water Works Co. v. *Hernandez*, 196 Ala. 438.

PETITIONER, WHETHER MEMBER OF BROTHERHOOD OR NOT, WAS SUBJECT TO THE AGREEMENT AND ITS PROVISIONS AS MADE AND CHANGED BY THE PARTIES THERETO.

Petitioner's employment by the Railroad Company in 1941, and prior thereto, embodied the terms of the "Collective Bargaining Agreement between the Louisville & Nashville Railroad Company and its Locomotive Firemen and Hostlers issued March 1, 1929," which incorporated the following articles:

> "Article 32 (a). The right to make and interpret contracts, rules, rates and working conditions for locomotive firemen and hostlers is vested in the regularly constituted Committee of the Brotherhood of Locomotive Firemen and Enginemen and the General Officials of the Railroad."
>
> "Article 43. Duration of Agreement. The rates, rules and working conditions as provided herein shall be continued in effect subject to thirty days' written notice by either party."

This agreement of March 1, 1929, had been modified from time to time and Petitioner fails to allege and set out in substance or in *hace verba* the modifications, but under the averment of his Bill that modifications had been made from time to time it may be accepted that such modifications were made under and pursuant to the provisions of the agreement and by the giving of written notice as provided in Article 43, *supra*, and by the Railway Labor Act.

The Railroad no doubt in March 1910, made an individual contract of hiring of the Petitioner and there-

after, except as Petitioner a member of the class of firemen had the benefit of this agreement of March 1, 1929, and the Railway Labor Act, there was no individual written contract between the Railroad and the Petitioner covering his wages, rates of pay, time of employment and working conditions, and as we read the several averments of the Bill, Petitioner makes no contention that there existed any valid or written individual contract between the Petitioner and the Railroad with reference to his claimed seniority rights or job assignments, except as found in the Agreement of March 1, 1929. For enforcement of these rights the plaintiff in the first instance looks to the Agreement of March 1, 1929, and all modifications or changes made therein and, notwithstanding the alleged individuality of his hiring contract he continued in the service of the Railroad under the Collective Agreement of March 1929, and subject to all changes made therein.

> "The seniority rights acquired by her did not arise by virtue of her contract of employment with her employer, but existed by reason of the agreement of 1921 between the Railway and the Brotherhood. Ryan v. New York Cent. R. Co., 267 Mich. 202, 255 N. W. 365. This agreement was executed for the benefit of all the members of the Brotherhood, and not for the individual benefit of Plaintiff. When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to

create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members."

Hartley v. *Brotherhood of Ry. and SS. Clerks*, 277 N. W. 887.

PETITIONER HAS NO STANDING EXCEPT FOR THE COLLECTIVE AGREEMENT.

At most the only individual transaction transpiring between the Petitioner and the Railroad, was the hiring of the Petitioner by the Railroad in 1910, and if this was all the Petitioner could rely upon, it would constitute nothing more than an indefinite hiring, which would constitute a hiring at will, and Petitioner would be wholly without the right, except for the Bargaining Agreement, to file this suit.

Peacock v. *Va. Carolina Chemical Co.*, 221 Ala. 682;

Moore v. *Ill. Cent. R. R. Co.*, 176 So. 569, 85 L. Ed. 1089, 312 U. S. 630.

And Petitioner being a Third Party Beneficiary of the Agreement, is bound by its terms.

"His rights depend upon, and are measured by, the terms of the contract. The right of a third person for whose benefit a promise is made is affected with all the infirmities of the contract as between the parties to the agreement. * * *.

"It has been said that before the beneficiary may accept the benefits of the contract, he must accept all of its implied, as well as express obligations. It has been said that if the beneficiary

accepts, he adopts the bad as well as the good, the burden as well as the benefit."

12 *Am. Jur.*, Sec. 289, p. 842.

"Of course, the right of the beneficiary of the contract is affected with all the infirmities of the agreement of the parties, and complainant, in attempting to enforce the same, is subject to all the equities arising out of the contract between the principal parties thereto. John F. Clark & Co. v. Nelson, 216 Ala. 199, 112 So. 819, 53 A. L. R. 173; Meyerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94, 55 A. L. R. 1231; 6 R. C. L. 886; 81 A. L. R. 1292."

Franklin Fire Ins. Co. v. *Howard,* 230 Ala. 668.

ONE NOT A MEMBER OF A UNION, BUT A THIRD PARTY, IS UNDER THE AGREEMENT.

Whether Petitioner was a member of the Brotherhood or not, he, as a member of the Craft or Class or a Third Party, is within the terms of the agreement, and therefore subject to all its provisions, including changes and modifications.

"But the case here before us involves, as would seem apparent, a still further step, and that is whether appellee who is not a member of the union which made the contract, but who has performed in accordance therewith, can rely upon and sue for its benefits; in other words, is he, as a third person, such a stranger to it that he can have no enforceable rights under it? That a third party may recover directly on a contract made expressly for his benefit is not an open question in this

State. Canada v. Yazoo & M. V. R. Co., 101 Miss. 274, 57 So. 913."

Y. & M. V. R. Co. v. *Sideboard,* 133 So. 671.

"When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed."

Y. & M. V. R. Co. v. *Webb,* 64 Fed. 2d 903-4.

BROTHERHOOD IS PRINCIPAL TO AGREEMENT.

The Brotherhood having been duly elected and certified as the Bargaining Agent of the Firemen thereby becomes the principal to the extent and in the respect that the Railroad cannot deal with each fireman as a principal, nor can it negotiate or conclude an agreement with any particular minority or majority group. Its dealings must be with the Bargaining Representative elected by the Craft or Class and no one else, and a Bargaining Representative is under no duty to take up with each of the employees it represents, matters which it is called upon to decide and agree upon in behalf of the Craft or Class.

Article 32 (a), Agreement of March 1, 1929;
Steele v. *L. & N. R. R. Co.,* 245 Ala. 133;
Donovan v. *Travers,* 285 Mass. 167, 188 N. E. 705;
J. I. Case Co. v. *National Labor Relations Board,* Vol. 88, L. Ed. Advance Op. p. 489;
Brotherhood of Railway Trainmen v. *Toledo, Peoria & W. R.,* Vol. 88, L. Ed. Ad. Op. p. 331;

Brotherhood of Ry. & SS Clerks, etc., v. *United Transport Service Employees of America, et al.*, Vol. 88, L. Ed. 153, Vol. 88, L. Ed. 375;
Order of Railroad Telegraphers v. *Ry. Express Agency*, 88 L. Ed. Ad. Op. p. 495.

MANDATORY FOR RAILROAD TO NEGOTIATE, AND IF PRACTICABLE, AGREE WITH BROTHERHOOD FOR ALL OF A CLASS.

The Railway Labor Act, U. S. C. A. 45, Sections 151 *et seq.* includes within its terms Petitioner as an employee, and the term "representative" includes an employee organization, or labor union, designated by the Employees to act for them. The jurisdiction and power of the Employee Organization is *neither limited* nor *defined* by the Railway Labor Act or Orders of the Interstate Commerce Commission. Section 151, Subd. 5 and 6.

The general purposes of the Act in nowise limit or deny employees the right to join a Labor Organization, but provide for complete independence of the carriers and employees in the matter of self-organization. Section 151a.

The Act requires the carriers and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions; to settle all disputes, whether arising out of applications of such agreements or otherwise; in conferences between representatives designated and authorized by the carrier and employees to consider and decide, if possible, all disputes between Carrier and

its employees; that representatives for the purpose of the Act be designated by the respective parties without interference, influence or coercion by either party over the designation of representatives by the other, and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives; employees shall have the right to organize and bargain collectively through representatives of their choosing. The majority of any Craft or Class of employees shall have the right to determine who shall be the representative of the Craft or Class for the purpose of the Act; and it is not within the province of the carrier to in any wise question the right of its employees to join, organize or assist in organizing the labor organizations of their choice, and such acts are prohibited and are unlawful, Section 152 (4); the carrier cannot require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization, Section 152 (5); in case of disputes between a carrier and its employees arising out of a grievance or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, it shall be the duty of the representatives of the respective parties within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute and to specify a time and place at which such conference shall be held; and no carrier shall change the rates of pay, rules or working conditions of its employees as a Class, as embodied in agreements, except in the manner prescribed in such agreements or in Section 156

of this Title; and the willful failure of the carrier to comply with the terms of the 3d, 4th, 5th, 7th or 8th paragraphs of Section 152 shall be a misdemeanor for which the carrier and its officers are subject to fine and imprisonment.

> "Yet negotiation, in the sense of bargaining collectively, under the Railway Labor Act, is an obligation imposed by law."
>
> *Brotherhood of R. Trainmen* v. *Toledo, Peoria & W. R.*, Vol. 88, L. Ed. Ad. Op. 337.

The purposes, validity and constitutionality of which Act has been upheld by this and other Federal courts.

> "The duty of the minority to recognize the authority of representatives selected by the majority was as binding in this respect as the duty of the carrier to treat with the representatives so selected with respect to pay, rules, working conditions of employees, etc."
>
> *Atlantic Coast Line* v. *Pope*, 119 F. 2d 43.

And the Brotherhood was the true and only Representative of the Firemen.

> "Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employee and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by Sec. 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board,

when read in the light of the declared purposes of the Act, and of the provisions of Sec. 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, *is exclusive.* It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." (Emphasis ours.)

Va. Ry. Co. v. *System Fed., etc.*, 81 L. Ed. 800, 802;

Steele v. *L. & N. R. R. Co.*, 245 Ala. 133;

Donovan v. *Travers*, 285 Mass. 167, 188 N. E. 705;

J. I. Case Co. v. *N. L. B.*, 88 L. Ed. Ad. Op. 489;

Bro. of Ry. Trainmen v. *Toledo, Peoria & W. R.*, Vol. 88, L. Ed. Ad. Op. 331;

Bro. of Ry. & S. S. Clerks, etc., v. *United Transport Service Employees of America, et al.*, Vol. 88, L. Ed. 153, Vol. 88 L. Ed. 375.

And the employees' seniority rights arise by reason of the Collective Agreement, and not by any individual contract of hiring. Seniority is fixed by the Collective Agreement between the Representatives of the Carrier and of the Employees, and that Agreement is subject to change or modification both under its provisions and under the statute in the manner provided.

The Railway Labor Act in nowise suggests, fixes, directs or determines the terms of the Collective Agreement. It makes no provision in behalf of any employee, other than that such employee shall have the right to participate in the designation of the representative of the Craft or Class to which he belongs. The Act does

not inject itself into or side with majority or minority groups.

Teague v. *Bro. of Locomotive Firemen*, 127 F. 2d 56;

Hartley v. *Bro. of Ry. & S. S. Clerks*, 277 N. W. 887;

Burton v. *Ore. Wash. R. & Nav. Co.*, 38 Pac. 2d 73.

"The railroad company recognized the telegraphers' union, since it included a majority of all telegraphers employed, as being a representative organization having authority to speak for the members of such craft. The Railroad company believed in the principle of collective bargaining. It was impracticable to deal individually with its thousands of employees engaged in various kinds of work, so it determined on a policy of dealing with a representative organization which could speak with authority. Congress, at the time this schedule was adopted, had recognized the principle of collective bargaining in the enactment of the Railway Labor Act (Act. Cong. Feb. 28, 1920. Sec. 301, 41 Stat. 469, (45 U. S. C. A., Sec. 132) * * * Since the railroad company was dealing with its employees collectively as evidenced by the schedule itself, it will not do for the plaintiff, who accepted employment pursuant to the terms and conditions of the schedule to say that he is not bound by the construction which the employees as a group gave to it. When plaintiff entered the employment of the company, he was bound to accept the schedule as it came to him, to be read in the light of established *practice and interpretation.* There could not be an interpretation for one employee and a different interpretation for another

one. It applied to all employees alike. Any other conclusion would do violence to the purpose and spirit of collective bargaining agreements." (Emphasis ours.)

Burton v. *Ore. Was. R. & Nav. Co.*, 38 Pac. 2d 75.

Paragraphs 8 and 9 (R., pp. 86, 87), aver that the defendant Brotherhood member firemen ever since the passage of the Railway Labor Act have chosen the Brotherhood as the representative under that Act of the entire Craft or Class of firemen employed by Respondent Railroad, and that the Brotherhood has claimed the exclusive right to act, and has acted as the exclusive Bargaining Agency and Grievance Committee of the entire Craft or Class, and that by virtue of the minority of negro firemen, they have been compelled to accept the Brotherhood as the choice of the majority for their Statutory Representative under the Railway Labor Act for the purpose of the Act, and *"they did so accept the Brotherhood as the representative under the Railway Labor Act for the entire craft or class of firemen, including themselves,* and assuming that the Brotherhood would exercise its powers under the Railway Labor Act without fraud or discrimination against them, *they relied on it for protection of their rights in Collective Bargaining and handling of grievance with respondent Railroad"* (R., p. 87).

When a Class of employees have elected their Bargaining Representative, and it has been duly certified to the Railroad, the Railroad is not involved and should

not be made a party to any proceedings in equity which is primarily concerned with differences or contentions among the employees of a Class, nor a Labor Union Representative, and employees who are not members of that particular Union. The present suit, so far as the Railroad is concerned, is nothing more nor less than a controversy between the negro firemen and the Brotherhood without any right or authority in the Railroad to take sides or be a party to it. The Petitioner, by the foregoing quoted averments of his Bill, has admitted his acceptance of the Brotherhood as his Representative under the Railway Labor Act, and this being true, the Railroad should not be implicated in any controversial matter between the non-members and the members of the defendant Brotherhood, the Brotherhood being the declared and accepted Agency and Representative of both the defendant Brotherhood and negro firemen non-members of defendant Brotherhood. Therefore, the Railroad should be privileged to deal with the Brotherhood as the sole Bargaining Agency and Representative of both the white and negro firemen.

The Railroad did not voluntarily accede to the demands made on it by the Brotherhood in its official notice of March 28, 1940, for change of agreement provisions and did not voluntarily grant, and in fact, never did grant in full the demand and request of the Brotherhood, but the Railroad, as the provisions of the agreement were finally agreed to, must be considered as having declined to grant the request of the Brotherhood, and as having negotiated to an agree-

ment which was finally made, and which was much more favorable to the negro firemen, than were the terms of the agreement proposed by the Brotherhood.

Considering the demands in the notice and terms of the agreement finally consummated, the conclusion is inescapable that the Railroad, instead of conspiring and confederating with the Brotherhood to negotiate an agreement wrongful or injurious to Petitioner's position, resisted the proposals of the Brotherhood, and conferred and negotiated to a conclusion an agreement as favorable to the negro firemen as was possible for it to obtain from the Brotherhood; and the Court must consider that in finally acceding to the terms of the agreement as finally consummated, the Railroad was confronted with a situation where had it taken an arbitrary position and denied all the demands of the firemen *in toto,* it would probably have been faced with a strike and serious interference with interstate commerce.

The Brotherhood was, as stated, the Representative of all the firemen, and therefore, the Railroad was under duty to negotiate with it and, if possible, to reach an agreement on the demands presented.

A CONTRACT MUST BE ACCEPTED OR REJECTED AS A WHOLE.

There are, no doubt, within the bounds of the agreement of March 1, 1929, many provisions beneficial to the Petitioner and which he has obtained through his Bargaining Representative. The position he now holds as a fireman and continues to work at is occupied by him by virtue of that agreement.

Thus enjoying the many beneficial provisions of the agreement negotiated and concluded in his behalf by his Bargaining Representative, and continuing daily to work under it, he cannot repudiate some provisions which he considers detrimental to his personal position.

> "Neither party to the contract will be allowed to affirm so much of the contract as is advantageous to him and enjoy all its benefits, and disaffirm and reject that which is burdensome" (30 Cyc., p. 354, subd. B and authorities cited).
>
> *Blackmon* v. *Quennelle*, 189 Alabama Reports, p. 633.

NEITHER FRAUD NOR CONSPIRACY CHARGED AGAINST RAILROAD SUSTAINED BY AVERMENTS IN BILL.

The several and entire allegations of the bill of complaint fail to certainly charge the defendant, L. & N. R. R. Co., with any fraud or participation in any fraud or conspiracy to effect a fraud upon the plaintiff. Such facts as are alleged are entirely to the contrary.

"Without question general averments of fraud, in effect no more than the conclusions of the pleader, will not suffice when challenged by demurrer. The bill should aver facts disclosing in what the alleged fraud consists, advising the respondent what he is called upon to defend. Harris v. Nichols, 223 Ala. 58, 134 So. 798; Hyman, *et al.*, v. Langston, 210 Ala. 509, 98 So. 564."

Williams v. *Williams,* 238 Ala. 639.

"A fraudulent intent should be averred, and not left in inference, for the inference of the intent would be but the inference of one fact from another. Bliss v. Anderson, 31 Ala. 625, 70 Am. Dec. 511; Seale v. Robinson, 75 Ala. 363."

Board of Rev. of Covington Co. v. *Merrill,* 193 Ala. 547.

The L. & N. R. R. Co. is subject to the provisions of the Railway Labor Act and to heavy penalty for the violation of its provisions.

The Bill of Complaint in this cause does not charge the Railroad with violation of the Railway Labor Act, but had the Railroad undertaken to do the things which are implied and suggested by the Bill, it most certainly would have run counter to the Act and would have violated its duty to the Bargaining Representative of all of the firemen, and been subject to heavy penalties. Moreover, it would have precipitated such a state of confusion in its relation with its firemen as no doubt would have brought on strikes and interminable and prolonged strife and litigation with the Brotherhood

and its several members, all to the great detriment and inconvenience of the public.

In fact, the Railroad could not have made a legal agreement with the Petitioner or the negro firemen.

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the *carrier's efforts* to modify its terms through individual agreements are not effective. The award, therefore, was in accordance with the law." (Emphasis ours.)
>
> *Order of Railroad Telegraphers* v. *Railway Express Agency,* Vol. 88, p. 498, L. ed. Advance Op.

The Bill fails to charge the Railroad with any connection with, or participation in, or advanced promise of compliance with the demands of the Firemen, or any act or acts causing such demands to be made—nor is there the slightest intimation that the Railroad had hoped to or would benefit by the changes demanded or made. Under the averments of the Bill the negro firemen had always rendered efficient and loyal services and no services more beneficial or profitable to the Railroad were promised by the proposed changes.

Steele v. *L. & N. R. R. Co., supra.*

NO FRAUD OR CONSPIRACY BY RAILROAD IN CHANGE OF AGREEMENT.

Paragraph 12 (R., p. 88) avers that on March 28, 1940, the Brotherhood, in fraud of rights of Petitioner, caused to be served upon the Railroad a Notice of its desire to amend existing Collective Bargaining Agreements covering the standard provisions in the individual hiring contracts of the individual firemen on the Railroad, aimed at driving the negro firemen completely out of the service of the Railroad, to the profit of its own members.

The Notice is set out as Exhibit "A," page 59 of Record, and the Amended Agreement and Interpretations at pages 10 to 21, inclusive.

It will be observed that this Notice advised the L. & N. R. R. Co. that *its employees* (emphasis ours) represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen had approved the presentation of a request to the Railroad for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, and asked the Railroad to accept it as the "Required Official Notice of our desire to revise the Agreement to the extent indicated" (R., p. 59), and in accordance with the terms of existing Agreement, and in conformity with the provisions of the Railway Labor Act.

This Notice was in form an authorized communication from the recognized Bargaining Agency and Representative of the Firemen as a Class or Craft, and

under both the then existing Agreement and Railway Labor Act an official and legal demand upon the Railroad requiring it to entertain, hear and negotiate on the several matters therein presented.

There is no allegation or charge in the Bill of Complaint that the Railroad had information or knowledge that the issuance of such a Notice had not been duly authorized nor that the Railroad had any part in its issuance or knowledge thereof until served. On the other hand, under the very wording of the Notice, its verity, authenticity and legality which the Railroad had no right or authority to question or to investigate informed the Railroad "that the Employees of the Railway *engaged in Service*" (emphasis ours) had approved the presentation of the request as embodied in the Notice.

This Notice was issued on March 28, 1940, but the agreement was not made until *February, 1941,* almost a year later. Therefore, ample time and opportunity were given to any and all firemen in the service to have interposed objections to the consummation of any agreement of compliance with provisions contained in Notice, or modifying the existing agreement so as to incorporate therein or substitute provisions in line with the Notice. We do not believe the Bill contains an averment that between the date of the issuance of this Notice, March 28, 1940, and the date of the agreement, February 18, 1941, the Petitioner or other firemen did not have knowledge or information which, if pursued, would have given them knowledge of the issuance of the Notice and its contents.

Since the Bill does not negative knowledge or information of the pendency of this Notice, it must be inferred that the Petitioner, and other firemen did, during the time it was outstanding between March, 1940, and February, 1941, have knowledge or information of the Notice in time to have made protests or objections thereto before February 21, 1941, eleven months after the Notice, but the Bill alleges no activities on the part of Petitioner or other firemen to prevent or obstruct the terms of the Notice becoming a part of the Agreement. The Railroad did not agree to revise the Agreement so as to incorporate therein the provisions of the Notice.

The Agreement made February 18, 1941, does not, by any means, adopt and incorporate into an agreement the provisions of the Notice. The terms of the Agreement, as amended and interpreted, are much more favorable to the Petitioner than were the changes demanded. Therefore, it must be conceded that the Railroad, in the first instance, did not accept and accede to the demands made upon it by the Brotherhood, and, second, that the Railroad negotiated an agreement more favorable to the Petitioner than the Brotherhood requested and advocated, and, third, the Railroad without even a protest from the Petitioner, and without help or assistance from the Petitioner, acted for and in behalf of the Petitioner and preserved for him certain rights which, but for the Railroad's acts in his behalf, he would have lost.

This Agreement (R., pp. 10 to 13) shows due execution by the parties, but it does not show the names

of the witnesses thereto. In fact, however, the Agreement was witnessed by George A. Cook, Chairman, and Otto H. Beyer, member of the National Mediation Board. See Railway Labor Act.

The Agreement and interpretation shown as Exhibit 11 (R., p. 13) were duly executed by Representatives of the L. & N. R. R. Co. and Brotherhood of Locomotive Firemen and Enginemen, pursuant to the provisions of the Railway Labor Act, and in accordance with the Agreement of March 1, 1929.

There is no allegation that the Agreements contravene any Federal or State law, and it is the opinion of the Railroad that they do not do so.

The Agreement, instead of prohibiting the employment of negroes as locomotive firemen, restricts the proportion of negro locomotive firemen and helpers to fifty percent; and eliminates the hiring of negro locomotive firemen and helpers until such proportion or percentage is established; and provides that until such percentage is reached on any seniority district, the filling of new runs or vacancies created as specified in the Agreement shall be by "promotable men," who, under present rules and practices, may not be negroes; and except as provided in Items (2) (a) and (2) (b) men now holding seniority as firemen or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

This is a far different agreement than proposed.

There is no allegation in the complaint that the Railroad has refused to employ negro locomotive firemen.

Locomotive firemen employed by the L. & N. R. R. Co. are represented by the Brotherhood of Locomotive Firemen and Enginemen, and the Bill contains no averment that the L. & N. R. R. Co. is informed or has any right or authority to be informed, or to know or have revealed to it, the provisions of the Constitution and By-laws of the defendant, Brotherhood. In fact, and it may be implied from the averments of the Bill, the Railroad is not informed of the provisions of the Constitution, By-laws or other regulations of the defendant, Brotherhood, or any rule of the Brotherhood which prohibits negro locomotive firemen from having a voice or part in the framing of proposals to be submitted to the Railroad, for agreement relating to wages, hours and working conditions.

> "It appears without dispute that the defendants have dealt with the representative of the Order in effecting the collectively bargained agreements, and they cannot be required to examine into the specific authority granted the representative of the Order."
>
> *Division 525, Order of Ry. Conductors of America* v. *Gorman,* 133 F. 2d. 278.

Under the averments of the Bill, Petitioner, at the time of making of the agreement, February 1941, was a fireman in road passenger service, and thereafter, on April 1, 1941, the jobs in said South End Passenger Pool were bulletined for bidding in "*because the firemen in the Pool had to be reduced after April 1, 1941, due to reduction in mileage*" (R., p. 92) (emphasis ours), and between the date of the making of the agree-

MICROCARD 22
TRADE MARK ®
44
MATTHEW BENDER & COMPANY
MB
1228 2
63
microcard

ment in February 1941, and January 3, 1942, Petitioner was reassigned to the South End Passenger Pool and restored on such date to the position which he previously held before reduction in forces. Had the Railroad agreed to the demands of the Brotherhood in its Notice, Petitioner would not have been restored within such a short time, if ever, to his previous job, and Petitioner does not specifically aver to what extent he was affected by the *reduction of forces because of reduced mileage.*

Therefore, instead of the Railroad conspiring to damage or injure Petitioner in any rights, it very materially protected and preserved for him and his associates rights which, under the Notice, would have been taken from him.

> "(7) There must be some wrongful act performed that was necessary to, and concurring in, the proximate cause of the injury to the person suing, or of the damage for which the suit is brought. * * * The acts complained of, however, must be definitely and accurately stated, so that, if the facts themselves should be admitted the court can draw a legal conclusion therefrom—thus the illegal purpose or means, which the conspirators meant to accomplish or to resort to, must be described accurately, for unless the object is illegal, or the means agreed upon are illegal, there is no actionable wrong."
>
> *Nat'l Park Bank* v. *L. & N. R. R. Co.*, 199 Ala. 198, 199.

"The weight of authority is to the effect that a conspiracy to procure the breach of a contract,

without direct fraud, force, or coercion, is not actionable."

McCluskey v. *Steele*, 18 Ala. App. 33.

Instead of the Railroad entering into a combination or agreement with the Brotherhood to do Petitioner a wrong or injury, it opposed and resisted what the Brotherhood proposed to do by its Notice, and only did that which, no doubt it was forced to do, in the interest of the public welfare, and to avoid a possible strike.

It is respectfully submitted that the Writ of Certiorari was improvidently awarded, and the cause should be dismissed as to the Louisville & Nashville Railroad Company.

CHAS. H. EYSTER,
WHITE E. GIBSON,
Attorneys for Louisville & Nashville Railroad Company.

I, Chas. H. Eyster, do hereby certify that I am one of the attorneys of record for the Louisville & Nashville Railroad Company, Respondent in the above and foregoing entitled cause, and that I have this day mailed a copy of the foregoing Brief, postage prepaid to Chas. H. Houston, Esq., 615 F Street, N. W., Washington, D. C., and Arthur Shores, Esq., 1630 Fourth Ave. N., Birmingham, Alabama, Attorneys for Petitioner in the above and foregoing entitled cause.

This day of November, 1944.

CHAS. H. EYSTER,
Attorney for Louisville & Nashville Railroad Company.